



## **PURCHASE AGREEMENT ESSENTIALS FOR COMMERCIAL TRANSACTIONS**

IOWA TITLE GUARANTY FALL CONFERENCE  
ALTOONA, IOWA

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## 1. Overview – Key Differences

- a. **Less Regulated.** Most federal and state laws concern consumer protection and generally do not apply in the commercial context. This includes laws pertaining to mortgage financing and servicing (Dodd Frank), landlord-tenant law (Iowa Code Chapter 562A), real estate disclosures act (Iowa Code Chapter 558A). Note that the disclosure law does apply to residential properties containing less than 4 dwelling units. One recent exception is that the 2013 Iowa Legislature implemented a Business Property Tax Credit for certain commercial, industrial, and railroad properties. The credit does not apply to residential or agriculturally classified property. The Act requires that purchasers file a new application to obtain the benefits of the business property tax credit.
- b. **Out of State Lenders and Buyers.** Typically the lenders are not familiar with nuances of Iowa law and the buyers usually use out of state attorneys not accustomed to our practices. This is not always a negative as some out of state practices can be improvements on standard Iowa procedures. There are a few typical standard differences which out of state attorneys find unusual about the Iowa standard practice: (1) title insurance, (2) widespread use of general warranty deed, (3) beneficial easements, and (4) attorney closers. The overall result is a less efficient process since the protocols are not as well-established.
- c. **Income Producing or Development Properties.** The investment component drives the primary differences for commercial real estate transactions. The buyer is usually purchasing for investment or income potential and not because they like the neighbors, school district, etc. This creates a different dynamic, one in which there are fewer emotions but also increased pressure on the parties involved – attorneys, accountants, etc. – to craft a good deal for the client. In certain distressed markets, the commercial transaction will also often have a winner and loser.
- d. **Less Realtor Involvement.** Not always the case but commercial realtors generally defer to the attorneys after the agreement is signed and deal enters the due diligence or closing phase.
- e. **Environmental.**

## 2. Letters of Intent

- a. **Two Approaches.** Most letters of intent (“LOI”) are less than two pages and at least initially prepared by the sales-person or broker. These generally identify the basics of the transaction. There is a trend, however, especially with certain institutional buyers, to circulate lengthy term sheets that attempt to negotiate the full contract provisions. Further, more and more institutional parties are less willing to re-negotiate the terms of these non-binding agreements. These

documents are intended to prevent lengthy contract negotiations but in my experience the contract provisions are not fair in the first place. A sample neutral letter of intent is attached for reference at **Exhibit A**.

- b. **Non-Binding.** This is usually the one golden-rule for any term sheet or letter of intent. It should always be clear that the agreement is not binding in any respect. That said the LOI will sometimes include some binding provisions. Some examples of binding agreements that are customarily considered for a letter of intent include:
  - i. **Exclusivity.** In the event a party desires to maintain an exclusive right to negotiate a transaction involving real estate, some consideration may be provided in exchange for a period of exclusivity in which the real estate may be prohibited from being publicly marketed or any transaction considered with a third party.
  - ii. **Good Faith Negotiations.** In the event that one of the parties is expending resources in the pursuit of a transaction consistent with the letter of intent, that party may want to be assured that the other party will agree to negotiate in good faith toward a more formal and complete legally binding agreement for the transaction on the terms and conditions contemplated by the LOI.
  - iii. **Break-up Fees.** In similar cases to the foregoing, a party may want to negotiate a break-up or termination fee in the event that such party is incurring costs (or foregoing other opportunities) in the pursuit of a transaction contemplated by the LOI in the event that such transaction ultimately fails to be negotiated to completion.
  - iv. **Right of First Refusal.** In some cases, a party may desire a right of first refusal or other option with respect to real estate for a certain period of time following the termination or expiration of an LOI in the event an agreement was unable to be reached, but especially after the expenditure of significant resources in pursuit of same.
- c. **Key Terms.** The LOI should include the key terms and provisions. This includes not only the purchase price and down payment but also requirements for estoppel certificates, due diligence period, document production, price allocation (personal property v. real property), tax proration if not customary, and cost allocation for items such as survey, Phase I, and title. The term sheet should usually address the brokers' commission to avoid any disputes since it is usually one of the larger line-items on the final closing statement and often there are multiple agents involved.
- d. **Inspection Period and the Unfunded Option.** The vast majority of commercial real estate transactions are basically unfunded options. The buyer pays a down payment which is fully refundable if the buyer terminates during a stated due

diligence or inspection period. In many respects, while not common, the option is a better deal for sellers since at least with the option the seller generally retains the option fee for allowing the buyer to lock-up the property for a period of time.

### 3. Purchase and Sale Agreement

- a. **Form.** Form of commercial purchase agreement is attached at **Exhibit B**.
- b. **Parties.** In the early stages of negotiation, both the buyer and the seller should ascertain the identity of the party or parties with whom they are dealing. The Seller should be the owner of the property. The buyer is often an entity and generally should not be an individual. Most real estate is acquired using a limited liability company. Each situation is different but the Limited Liability Company is usually the best entity for most real estate and mortgage investors interested in long term investments. Real estate held for long-term investment is considered a capital asset, subject to reduced capital gains tax. Investors flipping properties sometimes create s-corporations since tax treatment is ordinary income for such investors and the s-corporation can provide benefits for self-employment tax.
  - i. **Practice Pointer.** The buyer may at times be concerned that the seller has the proper authority to transfer the property. This is usually determined prior to closing and is an important benefit of title guaranty since the title certificate will usually insure the buyer for such matters (whereas not generally covered by the opinion of title).
- c. **Property.** In the commercial context, the property being sold is not always 100% real estate. The different types of properties need to be identified since the method of transfer is not the same. Personal property needs to be transferred with a bill of sale and over-the-road vehicles, if included, are transferred by certificate. In this respect, many commercial real estate transactions are more properly characterized as asset purchase agreements where the real estate is the primary asset.
  - i. **Sale of Ownership Interest.** In some asset classes (namely single tenant, high credit leases), it is common for the buyer to purchase 100% of the membership interest in the entity that owns the real estate. The owning entity is a single-purpose LLC which satisfies the lender's requirements. These deals usually involve the assumption of the debt as part of transaction. CVS and Walgreens stores are typical examples of these transactions; however, more large property owners (e.g., Red Lobster, Sears, Applebees) have announced recently sale-leaseback transactions which will most likely be structured in this manner.
    1. **Practice Pointer:** Unlike some states, Iowa does not have an entity transfer tax on the sale of membership interest in an entity. Thus, one benefit of a membership transaction is the seller does not pay

the transfer tax, plus there is no recording of the transaction disclosing the purchase price or existence of the sale.

2. **Practice Pointer:** There is added risk for buyer in purchasing the membership interest since they will be assuming any liabilities of the entity. This risk is not great for single-tenant buildings where the property is subject to a true NNN lease since owner in that situation is generally not managing the property and only collecting rents. The risk increases significantly if the selling entity is operating and managing the property. Bed bug litigation is an example of potential risk being assumed.

ii. **Personal Property.** It is important to identify the personal property being included in a sale of the real estate. This can also arguably affect the ultimate assessment of the property since the more personal property shown on the Declaration of Value the less value allocated to the Real Estate. In most cases, multi-family property includes the most personal property because of appliances and property maintenance equipment. Personal property may also include goodwill or other intangibles (websites, project names, etc).

1. **Practice Pointer.** Iowa Code section 428A.1 requires that the face of the deed recite the value of any personal property included in the sale of the real estate.

iii. **Accounts Receivable and Notes.** The contract needs to address the treatment of accounts receivable from any leasing activity. There are two primary methods. One, the buyer agrees to purchase the accounts receivable from the seller, usually at a discounted rate. Two, the buyer agrees to pay the seller any amounts eventually paid by the tenants towards the unpaid amounts. If this later approach is adopted, the contract needs to specify the priority of future rent payments. The contract should also specify whether the seller is able to pursue the tenant for unpaid amounts (often bad idea for both parties). If seller has obtained any judgments against tenants, seller would retain these rights unless assigned to buyer at closing.

1. **Practice Pointer.** Some owners take promissory notes from tenants for unpaid amounts. The buyer needs these assigned at closing plus receipt of the original debt instrument.

iv. **Real Estate.** The brokers often use the legal description from the Assessor's website. It is important to clarify what property your client believes he or she is selling or buying. There are often adjacent parcels which need to be excluded or included. If multiple parcels, the allocation again needs to be considered among the tracts. The last deed of record

should be obtained and reviewed and generally should be the legal description used on the contract until a survey or abstract can be reviewed.

1. **Practice Pointer.** If the legal description is lengthy and impossible to plot, a survey should be obtained. If survey not obtained, ask the County Auditor to review the legal description during due diligence to make sure the Auditor will not reject the deed at closing.

v. **Beneficial Easements.** If easements benefit the property, particularly easements for access, they should generally be included in the legal description. Note Title Standard 1.11. When an opinion is required as to access to the property by a private ingress and egress easement appurtenant to the property, the abstract must include the servient estate to the date of the recording of the grant of easement. Abstracting of the servient estate subsequent to the recording is not necessary.

1. **Practice Pointer.** Frontage roads along highways in older industrial parks are often problematic. The roads are usually treated as easements but there are often no maintenance or scope of use provisions. It can be difficult to satisfy the title standards for these properties and risky for buyers that plan to modify or change the use of the property or road.

#### d. **Purchase Price**

i. **Allocation of Purchase Price.** The buyer and seller will sometimes want to allocate different values to the various assets being sold. Generally the buyer will wish to allocate a large portion of the purchase price to depreciable property, i.e., buildings, fixtures, and equipment. The allocation issue is often missed in the initial contract discussions but should be addressed in the purchase agreement. It can be a difficult issue to resolve on the eve of closing. The tax authorities will generally concur with a negotiated allocation, but the allocation is not absolutely conclusive. *See Dixie Finance Co. v. United States*, 474 F.2d 501 (5th Cir. 1973).

1. **Practice Pointer.** Occasionally the buyer will request a portion of the compensation be characterized as a fee for a covenant not to compete (i.e., seller agrees not to operate a similar project in the same market). The seller should be aware that such a request likely converts a portion of the capital gain into ordinary income.

ii. **Assumption of Debt.** For membership purchase agreements, the buyer is often assuming the outstanding mortgage debt on the property. If buyer is assuming debt, the purchase price should reflect the debt being assumed.

In addition, the contract must make the lender's approval of the assumption a condition to closing. Which party will pay the transfer fees? The fees can be substantial.

1. **Practice Pointer.** Mortgages for certain asset classes include detailed assumption of debt provisions. These should be reviewed carefully before signing the purchase agreement to determine the process and costs for obtaining lender's approval for the assumption. In most cases, if debt is being assumed, the assumption process commences after the initial inspection/due diligence period.

e. **Earnest Money Deposit**

- i. **Interest.** In the current interest-rate environment, it generally is not worth the extra time and effort to place earnest money in an interest bearing account, particularly because escrow agents usually impose a fee for such services that will exceed any interest earned on the amount. Earnest money amounts vary widely but it is not uncommon for the earnest money to be less than 5% of the purchase price.
- ii. **Letter of Credit.** Some large buyers may attempt to substitute a letter of credit in lieu of a cash deposit. This is generally unacceptable for most sellers.
- iii. **Closing Agent.** The contract should identify the party responsible for holding the earnest money and closing the transaction. The closing agent sometimes signs the contract or there is a separate escrow agreement. It is not uncommon for the attorney for buyer or seller to hold the earnest money in the attorney's trust account. For smaller sums, this is often acceptable; but for larger transactions, it is not recommended. First, the attorney's client will sometimes assume the earnest money is not at risk if own attorney is holding the funds. If a dispute arises, the attorney generally needs to tender the funds to the court or otherwise back out of the deal. Second, out of states buyers and attorneys usually will not agree to it. It is generally best for both parties to use a third party escrow agent.

1. **Practice Pointer.** Iowa Title Guaranty Commercial will act as the closing agent and hold the earnest money on any commercial transaction. In my experience they are far better to work with than out of state closing offices, which at minimum require delivery of documents out of state and then utilize in-state agents to record.

f. **Due Diligence and Inspection**

- i. **Generally.** As noted above the unfunded option is standard practice for commercial real estate transactions. This usually means the buyer obtains a “free-look” period in which to inspect the property and documents. The rationale for the free-look is that the buyer will be investing time and money determining if the project is acceptable and buyer needs the assurance that seller will not transfer the property to someone else in the meantime. Broadly speaking, for commercial transactions involving constructed and operating rental property, the due diligence period ranges from 60 to 120 days. For development property, the period is longer (90 to 180 days) on theory that buyer needs to obtain development approvals (subdivision, rezoning, site plan, etc.).
  - 1. **Practice Pointer.** The challenge for seller is to shorten the “free-look” period while buyer wants as long as possible. The middle-ground is usually to provide a due diligence period long enough to obtain most approvals but if buyer needs more time then buyer has option to extend the due diligence period by placing some or all of the earnest money at risk. Alternatively, the buyer may be required to pay additional earnest money for an extension of the due diligence period.
  - 2. **Practice Pointer.** If a generous inspection period is provided by seller, seller should insist in return that the sale of the property be As-Is, and thus limit the representations and warranties provided in the contract.
- ii. **Two Approaches.** In drafting the due diligence section, there are two approaches – easy-out and specific. The more common approach is to grant the buyer an open-ended right to walk away during the inspection period “for any or no reason” and receive a full refund of the earnest money. In some transactions, the buyer’s inspection rights are identified and buyer is only able to terminate the agreement for specific reasons, such as failure to obtain franchisee approval.
- iii. **Government Approval Period Distinguished.** For land development deals, the buyer will sometimes agree to a shorter inspection period (for purposes of inspecting the property) followed by a separate “government approval period” in which the buyer makes application and pursues the necessary governmental approvals for the development.
  - 1. **Practice Pointer.** The seller will want to be careful – especially on speculative deals – that the buyer not be permitted to finalize any government approvals before closing or at least before some of the earnest money becomes non-refundable. If the buyer terminates after property has been re-zoned or platted, the seller may need to un-wind these entitlements before locating a new



buyer or developing the property for an alternative use. This unwinding will cost time and money.

2. **Practice Pointer.** Be careful of contingencies that run to the date of closing.

- iv. **Inspection Rights.** Seller will usually grant free access to the property to conduct inspections and investigations. This in part benefits Seller when conveying the property As-Is. However, the free access should have a few conditions and qualifications. First, often the seller will want the buyer to obtain the seller's consent before commencing any Phase II or invasive environmental testing. In some cases concerning known or likely contamination seller would prefer to not know the outcome of such testing and instead locate a buyer that will take the property as-is without delay. Second, buyer should indemnify the seller from any damage caused by buyer's inspections. The contract will sometimes require proof of insurance before buyer or agents are allowed to enter the property. Third, if property is occupied by tenants, the buyer's access needs to be subject to the rights of tenants in any lease agreement, which often requires 24 hour notice. Consider whether the contract should prohibit the buyer from speaking with any of the tenants.
- v. **Delivery of Documents.** The contract usually requires the seller to make available for buyer copies of all documents pertaining to the property. The requirement, from the seller's perspective, should be limited. Seller should try to limit disclosure to documents in seller's actual possession and should agree to make the documents available for inspection at buyer's request, rather than agree to provide copies of such documents. Most important, seller should insert a provision that no representation or warranty is made with respect to the truth or accuracy of the materials provided. Without this provision, disputes could arise post-closing concerning the completeness or accuracy of the information. These disputes are more common with so much communication with tenants occurring via email. The emails are often not included in the documents provided to the buyer.
- g. **Financing Period.** A financing condition is fairly common on commercial real estate transactions, although the period in which to obtain such financing is sometimes included in the general free-look period referenced above. If a separate financing condition is included, the buyer will want to avoid specifics concerning the financing, such as minimum down payment requirements. The buyer will want to terminate the contract without having to evidence good faith effort in locating the financing prescribed in the contract. The Seller has an incentive to require the buyer spend resources obtaining the financing.
- h. **Environmental.**

- i. **Federal Law.** In 1980, Congress passed what became known as Superfund (the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA). After CERCLA come RCRA, TSCA, CWA, CAA and a multitude of other environmental acronyms.
  - 1. CERCLA and Federal Law generally only at issue with the most contaminated sites. EPA manages CERCLA.
  - 2. Parties liable under CERCLA include a person who bought the land and finds out that it is heavily polluted. The buyer need not have caused the contamination to be liable. If you own the property, under CERCLA, you own the environmental problem, subject, however, to changes in 2006 under the Phase I Audit.
- ii. **Iowa Law.** Iowa also has passed regulations that have the affect of imposing environmental liability or costs on a property owner. Iowa Code Chapters 455A through 455K contain the bulk of the statutes addressing Iowa environmental law. Most of the environmental regulations which have been promulgated to support these statutes can be found at Chapter 567 of the Iowa Administrative Code. The Iowa statutes and regulations are designed to implement federal regulations as well as to address unique Iowa provisions. The Iowa statutes implement the Clean Air and Water Acts provisions of the federal statutes.
  - 1. **Blue Chip.** In contrast to federal law, under Iowa law, it is the “person having control” that is liable and that person must have produced, handled, stored, used, transported, refined or disposed of a hazardous substance. See 455B.381(8). This distinction with federal law became clear in *Blue Chip v. State of Iowa and DNR*, 528 N.W. 2d 619 (Iowa 1995). *Blue Chip* held that, with regard to the defense of an action by the Iowa Department of Natural Resources, a current landowner (i.e. potential buyer) is liable only for: (1) that which was caused by the current landowner and (2) a share (perhaps 100%) of the cost of investigation, evaluation, and development of a remedial plan for abatement of the contamination (a much less costly activity than paying for the actual clean-up).
- iii. **Creating The Environmental Baseline; All Appropriate Inquiry.** It is customary for a buyer of real property to engage a qualified environmental consultant to complete a “Phase I” environmental assessment of the property prior to acquisition, in order to qualify for certain defenses to environmental liability under the law in connection with hazardous materials that may be located at the property under the “all appropriate inquiry” standard (also sometimes referred to as the “innocent purchaser” defense). The consultant performs various research of public record and

interview of key personnel in order to determine the prior history of hazardous materials in and around the property, and presents its analysis, conclusions and recommendations in the Phase I Report, along with certain certifications required to qualify for protection under the law.

1. **Practice Pointer.** The ASTM standard for Phase I's excludes asbestos, lead paint, wetlands, and radon.

- iv. **RECs; Phase II.** In the event that the Phase I identifies any Recognized Environmental Conditions ("RECs"), then in addition to describing the conditions the Phase I should recommend the further testing and analysis required to be performed in a "Phase II" environmental assessment. Phase II testing usually involves sampling of soil, groundwater, and air, and laboratory analysis to determine whether there is contamination and, if so, its nature and extent.

#### i. **Estoppel Certificates**

- i. **Certificate.** The estoppels certificate is a document signed by the tenant certifying to the buyer that certain facts are true. The basic certificate includes statements from the tenant as to the lease commencement date, rental amount, prepaid rents, and whether there are any known defaults under the lease. While often overlooked, the estoppel certificate is important for buyers. Without the estoppels, the buyer assumes the risk that a tenant raises issues after closing which weren't discovered prior to closing (for example, "the landlord promised to install new HVAC" or "promised that I could pay rent twice per month"). The representations and warranties in the purchase agreement, even if they cover such matters, require a lawsuit to enforce and often the seller no longer has any assets. It is far better to avoid these disputes by obtaining statements from the tenant prior to closing. A standard form estoppels certificate is attached at **Exhibit C**.

- ii. **Requirements in Leases.** While some tenants may comply notwithstanding the terms of their lease, usually a tenant will only provide an estoppel if the lease agreement requires them to provide it. A seller should be careful when promising estoppel certificates from tenants not required by contract to deliver them.

1. **Practice Pointer.** Commercial landlords should always use a lease form that requires tenant to provide estoppels certificates within 10 days of request.

- iii. **Threshold Requirements.** For larger multi-tenant properties, it can be difficult and time-consuming to obtain estoppels from 100% of the tenants. One option is to require estoppels from only the primary or

largest tenants and or permit less than 100% of the estoppels to be provided.

j. **Representations and Warranties**

- i. **Conceptual Dialog.** Perhaps no area of negotiations produces such predictable dialogues between seller and purchaser as the area of representations and covenants. To some extent the problem occurs because the position of both parties is reasonable.
- ii. **The Seller's Position.** Generally the seller will tolerate some contingencies but will resist representations and covenants — the former merely stand in the way of the closing while the latter may give the buyer a damage claim. The seller's concern for "downside" is more acute in the event of seller financing because the buyer may attempt to use such a damage claim to relieve it from burdensome purchase-money mortgage payments. As support for its position, the seller can argue that since the purchaser has inspection contingencies it does not need representations and covenants.
- iii. **The Buyer's Position.** Generally the buyer will insist that the seller represent facts which the buyer assumed accurate on execution of the contract. As support for its position, the buyer can argue that the seller's property file is far more extensive than buyer can accumulate in a brief inspection period. Moreover, contingencies merely permit termination of the contract of sale, which is hardly an adequate remedy after the buyer has expended considerable time, effort and expense in the project.
- iv. **Possible Compromises.**
  1. **Knowledge Qualifier.** The representations can be limited to the *knowledge* of the seller instead of to the absolute veracity of facts. To be sure, such limitation may place a burden of proof on the buyer to prove the seller's state of knowledge; however, the mere listing of representations should prompt disclosures on the part of the seller before the contract is executed.
  2. **Timing.** The representations and covenants can be limited in time so that they expire at the closing or at a fixed point in time after the closing.
- v. **Specific Representations.** The list of possible representations is rather extensive but the following includes the seven most common:
  1. Seller has no knowledge of any violations of city, county, state, federal, building, land use, fire, health, safety, environmental,

hazardous materials or other governmental or public agency codes, ordinances, regulations, or orders with respect to the Property, or any lands owned by Seller adjacent to the Property.

2. No litigation is pending, threatened or likely with respect to the Property, Seller's interest therein, which would inhibit Buyer obtaining clear title to the Property.
  3. There are no unrecorded leases, arrangements, agreements, understandings, options, contracts, or rights of first refusal affecting or relating to the Property in any way.
  4. Except to the extent this Agreement provides otherwise, the Property will remain in the condition existing as of the execution of this Agreement until Closing.
  5. The individual signing this Agreement on behalf of Seller has the authority to bind Seller to the agreements set forth herein.
  6. Seller has no knowledge that the Property contains sinkholes, caverns, faults, conduits, voids, mines, or other geological anomalies which could affect the development of the Property.
  7. The Property is not contaminated with, nor threatened with contamination from outside sources by, any chemical, material or substance to which exposure is prohibited, limited or regulated by any federal, state, county, local or regional authority or which is known to pose a hazard to health and safety and to the best of Seller's knowledge, the Property has never been used for a landfill, trash pit, dump site, underground improvements, unlawful storage of hazardous or regulated substances, or by a manufacturer of any product or for any other industrial use, nor to the best of Seller's knowledge, is the Property in violation of any wetlands or other environmental limitation.
- vi. **Value of Representations.** Too often the representations are heavily negotiated without focusing on whether there is any practical remedy for breach of a representation. If the seller is a single-asset entity, the representations will not be of any value unless they are made by the individual owners. While hold-back amounts are common in asset purchase agreements, they are not common in real estate transactions. The client should be aware of the actual value of any representation and warranty. In most cases they should not be relied upon in lieu of third party investigations (e.g., obtain estoppels from the tenant rather than a promise from seller that there are no known default on the leases).

k. **Covenants**

- i. **Status Quo Maintained.** The buyer will insist that the seller continue to operate the property after the contract execution (prior to the closing) in the same manner as before the contract execution. For example, the seller should keep the property fully insured, should continue to make required repairs and should pay all trade accounts. With regard to insurable casualties occurring prior to the closing, the purchaser should insist that the seller either repair the damage or assign the insurance proceeds to the purchaser (if they are assignable); moreover, in the latter case, the purchaser will request the seller to make up any deficiency in insurance or any portion of the proceeds which the mortgagee applies to the mortgage.
- ii. **No Substantial Changes.** The buyer should have veto power over any leases, management contracts and the like (except perhaps in the normal course of business) in order to avoid “sweetheart” contracts immediately prior to closing.

l. **Prorations and Credits**

- i. **Real Estate Taxes.** The treatment of real estate taxes for residential transactions is usually the same for commercial transactions. In some cases the seller may be able to argue that no credit or proration for taxes should be given at closing because the taxes are being paid by the tenants under NNN leases. This argument should usually fail unless it was negotiated on the front end. The exception would be where the tenant pays the taxes directly and the property is subject to a long-term lease. In this situation the tax proration arguably results in a windfall to the buyer.
  1. **Practice Pointer.** The leases should be reviewed before closing. Some high credit leases include a provision that the tenant is not responsible for any tax increases resulting from an increase in assessed value after the property is transferred. This could mean that the buyer is unable to pass-through subsequent increases in the real estate taxes.
- ii. **Utilities and Operating Expenses.** For large commercial properties it is often impossible to have a reading on the day of closing and a perfect true-up of expenses. The contract should include a provision that the intent of the parties is that the buyer be responsible for costs and expenses after closing while the seller be responsible for such expenses prior to closing. This type of provision can require a true-up by the parties if after closing a significant unfairness is discovered (e.g., prepayment of utilities).

- iii. **Security Deposits.** The contract should require the seller to credit the buyer for any security deposits identified in the rent roll or leases.
- iv. **Rent.** The rent under the leases is usually prorated to the date of closing. The proration usually assumes 100% of the rent was in fact paid in the month of closing. If closing is near or at end of the month, there is usually not time before next month's rent is due for the seller to inform the tenants of the change in ownership and new address for rent payments. The parties usually agree to address this issue outside closing but in some cases the contract should be amended to make clear that any rent payments paid to seller after closing belong to buyer.

m. **Title**

- i. **Title Opinion.** The attorney's title opinion without Title Guaranty is still often used for smaller commercial transactions (less than \$500,000), and is perhaps most common with cash deals involving existing clients. Most out of state lenders will require a title certificate no matter the dollar amount of the transaction. The title opinion without Title Guaranty is not recommended for larger transactions and even for smaller transactions Title Guaranty is becoming more common.
- ii. **Title Guaranty Certificate.** The Title Guaranty Certificate has a number of additional advantages in the commercial context. The primary advantage is it provides broader and more specific protection for the owner and lender. The standard exceptions in the attorney's title opinion include a number of items which can be covered by endorsement or affidavit in an ITG Certificate. In some cases the transaction closes only because of the issuance of an endorsement providing coverage for a title problem that otherwise would cause the deal to collapse. In addition, commercial transactions increasingly require the use of third party escrow services. Title Guaranty serves this third-party function, issuing the title work and acting as escrow agent.
  - 1. **Standard Exceptions (Schedule B – Part II).** The standard exceptions are the off-record exceptions that apply to all properties rather than those recorded against the specific property. They are: (1) Any right or claim of a party in possession; (2) any matter that would be disclosed by an accurate and complete land survey; (3) any unrecorded easement or claim of easement; (4) any lien or right to a lien, for services, labor or material heretofore or hereafter furnished; and (5) taxes or special assessments not shown as existing liens by the public records.
  - 2. **Extended Coverage.** Extended Coverage consists of waiving the standard exceptions. Generally, these survey, easement, and

mechanics lien exceptions may be waived upon executed Composite Mortgage Affidavit and a current ALTA survey. The reason for the ALTA survey is so that all evidence of possession, boundary lines and easements may be raised as specific exceptions to coverage on the policy.

- a. **Practice Pointer.** The coverage for mechanic's liens often arises and is a requirement for most lenders. If construction is contemplated, it is important that no construction commences before the closing and recording of the mortgage. If the Owner's Statement identifies that work is ongoing on the property, ITG will not cover mechanic's liens unless waivers and indemnities obtained.

3. **Endorsements.** Endorsements are available for almost any title issue or situation. See <http://www.titleguarantycommercial.com>, for the .pdf identifying the endorsements. The following is a list of some of the more common endorsements for commercial transactions:

- a. **Access Endorsement.** Access is often the most important title issue on commercial property. Access to certain public roads, common driveway/parking and private roads are essential for co-owners, clients, vendors and staff.
- b. **Comprehensive Endorsement.** Like the title implies, this is a comprehensive series of protections from losses due to violations of covenants and restrictions of record, and from encroachments of existing improvements across the boundary lines of the subject property. This is almost uniformly requested by lender's and buyer's counsel in commercial transactions.
- c. **Contiguity Endorsement.** This endorsement may be advisable where the value of the **subject** property derives at least in part from being adjacent to a public road or separate property. The endorsement protects the insured against losses which may result if it is later determined that the subject property is not contiguous to said highway or property. ITG can insure that multiple parcels are contiguous (no gaps).
- d. **Survey Endorsement.** This endorsement protects the insured against losses resulting from inaccuracies in the survey of the subject property. The buyer should always be advised to obtain a survey for every commercial



transaction. This is in part because the subsequent buyer may obtain a survey and if issues arise the buyer will be stuck resolving them.

- e. **Zoning Endorsement.** There are two different types of zoning endorsements. The first type is desirable where it is contemplated that improvements will be made to the subject property. The zoning of the subject property is stated in the ITG Certificate, a list of permitted uses is provided, and protection is given against losses resulting from a determination that the insured is unable to use the subject property pursuant to the listed zoning or uses. The second type of zoning endorsement, called the Completed Structure endorsement, protects against losses suffered as a result of a court order or judgment that the improvements, present on the property at the time of the transaction, are in violation of local zoning law.

- i. **Practice Pointer.** The zoning endorsement requires the applicant obtain a zoning letter from the applicable zoning officer. Plan ahead. These letters can take a few weeks to arrive in some cases.

- 4. **Owner's Review Memorandum.** The attorney representing the buyer or lender should prepare and provide a title review memorandum.

- n. **1031 Exchange**

- i. In order for either party to conduct a 1031 Exchange, the contract should include a provision requiring each party to cooperate with the other party in any 1031 Exchange for the sale or purchase of the property. If the contract does not allow assignment, the 1031 intermediary will require an amendment of the contract to allow assignment.

- 4. **Closing Procedures**

- a. **Documentation of the Closing.** Frequently the form of all closing documents is negotiated at the time of the initial contract negotiations (with all closing documents being attached as exhibits to the contract).

- b. **Documents to be delivered at Closing.**

- i. **Deed.** The buyer will request a general warranty deed; however, the seller will seek permission for a special warranty deed.

- ii. **Other Assignments.** Frequently the parties will agree upon additional documents, often containing representations and covenants, related to the specific transaction. Several of the most common documents are as follows: Bill of Sale, Assignment of Leases (executed by both parties and generally containing provisions for brokerage commissions, prepaid rentals and security deposits), Assignment of Service and Supply Contracts, Assignment of Insurance (unless cancelled, with the purchaser acquiring new coverage), Assignment of Warranties, Guarantees and Bonds, and Assignment of Trade Names.
- iii. **Notice to Tenants.** A letter should be provided to the tenants informing them of the change in owner and new address for payments.
- iv. **Application for Business Tax Credit.** The buyer after recording of the deed should file a new application for the Iowa Business Tax Credit.

(02261292)

**EXHIBIT A**  
**LETTER OF INTENT - SAMPLE**

Re: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ (the "Property" – Exhibit "A")

Dear \_\_\_\_\_:

On behalf of \_\_\_\_\_ or Assigns, \_\_\_\_\_ has been authorized to submit the following non-binding Letter of Intent to acquire \_\_\_\_\_ (the "Property"). The Property also includes all of Seller's right, title, and interest in and to all furniture, fixtures, furnishings, inventory, and equipment and other personal property located on or used in connection with the Property.

- (1) **Purchase Price:** \$\_\_\_\_\_ all cash at closing. Buyer and Seller shall allocate the Purchase Price amongst the items constituting the Property.
- (2) **Deposit:** \$\_\_\_\_\_ cash or bank check to be delivered within five (5) business days of the full execution and delivery of a contract (the "Purchase and Sale Agreement" or "PSA"). The Deposit shall be held in escrow by the Title Company and shall be fully credited toward the cash portion of the Purchase Price at the Closing.

Upon the completion of the Due Diligence Period, if Purchaser has agreed to proceed with the purchase of the Property, Purchaser will tender an Additional Deposit of \$\_\_\_\_\_,000.00 (cash or bank check) and the full deposit of \$\_\_\_\_\_,000.00 shall become non-refundable (subject to performance by Seller of its obligations under the Purchase and Sale Agreement), as agreed to in the PSA and shall be fully credited toward the Purchase Price at closing.

- (3) **Due Diligence Period:** The Due Diligence Period shall be for a period of sixty (60) days commencing upon the execution and delivery of the PSA. During such period, Purchaser shall be entitled to conduct all inspections and reviews relating to the Property typically performed by a purchaser including an analysis of the structure and building, underwriting and risk analysis, environmental and engineering evaluations and testing and a review of property plans, current leases, operating and management expenses and reports, real estate tax bills, title and survey documents, etc. See Exhibit A for a list of required information for delivery to Purchaser from Seller.

Purchaser shall have the right to terminate the Purchase Agreement at any time without exception and/or contingencies during the Due Diligence Period for any reason or for no reason in which event Purchaser shall be entitled to an immediate return of its Deposit together with all interest accrued thereon. The PSA shall be worded so that the Purchase and Sale Agreement automatically terminates at 5:00 PM on the day of the end of the Due Diligence Period (as defined in the PSA) unless Purchaser affirmatively elects to waive its right to terminate the PSA.

(4) **Environmental  
Matters and Survey:**

Seller shall provide Purchaser with an ALTA survey and all environmental documents available to Seller within ten (10) days of the execution of the PSA. To the extent the survey and/or environmental documents are not provided within ten (10) days, delays of such deliveries will extend the contract Due Diligence Period dates by one business day for each business day the ALTA survey and/or environmental documents have not been delivered to Purchaser.

Purchaser shall have the right to conduct, at its own expense, an ASTM-Standard Phase I Environmental Site Assessment (ESA) and/or any other reasonable investigations, tests, searches, reviews, studies, or examinations into the environmental status of the Property during the Due Diligence Period. Seller shall provide Purchaser or its agents with physical access to the Property, upon request, for the purposes of undertaking and completing environmental due diligence. However, the Purchaser shall not perform any Phase II Environmental inspection without first obtaining Seller's written approval.

Purchaser may obtain, at Purchaser's expense (subject to fee splitting in the event of closing pursuant to Section 13) a new certified ALTA As-Built Survey for the Property (the "New Survey"). Any objections noted by Purchaser shall be treated in the same manner as objections to marketable title.

(5) **Documents:**

Within ten (10) business days following the execution of the PSA, to the extent Seller has such documents in its possession or in the possession of its agent(s) or brokers, Seller shall furnish Purchaser with original or legible copies of the items listed on Exhibit \_\_\_\_ attached hereto.

(6) **Marketable Title:**

Seller shall convey the property to Purchaser at the Closing free and clear of all restrictions, declarations, encumbrances, liens or other adverse claims of any nature whatsoever other than Permitted Exceptions. As used herein, "Permitted Exceptions" shall mean typical utility, drainage and access easements necessary for the operation and maintenance of the Property, liens for taxes, water charges, sewer rents and other governmental charges not due and payable by or at the Closing (provided same are apportioned between Seller and Purchaser in the customary

manner); leases and occupancy rights as may be approved by Purchaser, and such other non-monetary encumbrances or exceptions as may be acceptable to Purchaser.

- (7) **Right to Operate:** From the execution of the PSA through the Closing, Seller or its agent shall continue to manage and operate the property in a first class manner consistent with the operation at the present time; however, during this period Seller shall not implement any operational changes, including, without limitation, the termination, extension or renewal of major service contracts in effect on the date the Purchase Agreement is executed, or enter into any new major service contracts (unless cancelable by the owner on not more than 30 days notice) or leases, without having first obtained the written consent of Purchaser, such consent not to be unreasonably withheld. Following the expiration of the Due Diligence Period, no new leases or management/operating agreements may be signed by Seller without the written consent of Purchaser.
- (8) **Closing:** The Closing shall occur thirty (30) days following the conclusion of the Due Diligence Period.
- (9) **Brokers' Commissions:** Seller shall pay a real estate brokerage commission equal to 1.5% percent of the sales price of the property to \_\_\_\_\_ at the time of closing. Purchaser shall represent that it has dealt with \_\_\_\_\_ and no other brokers regarding this transaction.
- (10) **Purchase Agreement:** Purchaser's obligations to proceed are subject to the execution of a PSA. Upon Seller's confirmation that it wishes to proceed by Seller's signing and returning the enclosed duplicate original of this Letter of Intent, Purchaser and Seller agree to negotiate in good faith and within fourteen (14) days to complete and execute a mutually acceptable Purchase and Sale Agreement and related documents. The documents will incorporate the terms and conditions set forth herein (or as modified by the parties) and other typical of a transaction of this kind. Seller will provide Purchaser with drafts of the PSA and any other related document within three (3) business days following the date of the execution of this Letter of Intent.
- (11) **Confidentiality:** This letter is being transmitted to you with the express understanding that you shall keep confidential its contents and the fact that it has been transmitted.
- (12) **Adjustments and Prorations:** Adjustments and prorations of income and expenses of the Property (including rent, utilities, income and expenses, and prepaid items) shall be made in accordance with industry practice. Seller shall cause to be paid all real estate taxes for all fiscal years ending prior to the fiscal year in which the closing occurs; real estate taxes for the year in which closing occurs shall be prorated to the date of Closing.

Seller shall also pay any unpaid real estate taxes payable in prior years. Purchaser shall pay all subsequent real estate taxes. Any proration of real estate taxes on the Property shall be based upon such taxes for the year currently payable unless the parties state otherwise.

(13) **Expenses:**

In the event of closing, Seller and Purchaser shall equally share the costs of all recording and transfer taxes and deed stamps imposed by reason of the transfer of the Property, escrow fees, the New Survey, and the cost of an ALTA Owner's policy with extended coverage in the full amount of the Purchase Price. Purchaser shall pay any additional premium for additional endorsements. Each party shall pay its own attorneys' fees and all of its other expenses incurred in connection with the transaction.

(14) **Non-binding Agreement:**

This letter is solely intended as an expression of intent and shall not be a legally binding agreement (except that parties shall be bound by the terms of the "Exclusivity" and confidentiality" provisions). Neither Purchaser nor the Seller shall have an obligation to close the transaction described herein until such time as they, in their sole discretion, enter into the definitive agreement regarding a transaction.

(15) **Estoppel Certificates:** At Closing, Seller shall deliver estoppel certificates in a form satisfactory to Purchaser, dated not more than thirty (30) days prior to the Closing Date, from all space tenants.

(16) **Lease Termination:** At Closing, the parties agree that the lease agreement between Purchaser and Seller shall be terminated and of no further force and effect.

If the forgoing is acceptable, please have the authorized officer of Seller sign and return the attached copy of this letter to us no later than \_\_\_\_, 20\_\_\_\_.

Very truly yours,

By: \_\_\_\_\_

**AGREED TO AND ACCEPTED THIS**  
**\_\_\_\_\_ DAY OF \_\_\_\_\_, 2015**

By: \_\_\_\_\_ (signature)

\_\_\_\_\_ (name)

\_\_\_\_\_ (title)

**DOCUMENTS TO BE PROVIDED  
LETTER OF INTENT**

- A. To the extent any of the following documents or items are in Seller's or Seller's agent's possession or control and have not already been delivered to Purchaser, Seller shall deliver original or legible copies of the following documents to Purchaser within ten (10) business days following the effective date of the execution of the PSA.
1. Detailed operating and expense statements for the last three (3) years including the year-to-date 2010.
  2. Current management, maintenance and service agreements and contracts relating to the Property.
  3. Copies of real estate tax bills for the current and prior two (2) tax years, including information regarding any proposed reassessments or appeals relating to the Premises.
  4. A list of any personal property or chattel currently used in the maintenance and operation of the Property which shall be included in the sale (including furniture, fixtures and equipment).
  5. Copies of all certificates of insurance evidencing All Risk Property Insurance and General Liability Insurance pertaining to the Property and chattel.
  6. Copy of the most recent title insurance report for the Property.
  7. Any structural, roofing, plumbing, mechanical and electrical reports relating to the Property prepared within last three (3) years.
  8. Set of "as built" and "as existing" plans and specifications for the Property.
  9. Documentation concerning any actual, pending or threatened litigation against the Property or Seller (relating to the Property and/or its ownership).
  10. Copy of any appraisals of the Property.
  11. Documentation concerning violations cited against the Property (whether or not corrected), from the federal, state, county or local regulatory authorities within the last three (3) years.
  12. Copies of all Certificates of Occupancy (or their equivalent) issued for the Property, plus copies of any other permits or certificates that have been issued relative to the operation or use of the Property in Seller's or Seller's agent's possession.
  13. Copies of any reports, studies, analyses or permits issued relating to proposed subdivision, building modifications, additional construction, building removals, site work, etc. prepared in the last three (3) years.
  14. Letters verifying zoning and utilities.
  15. Copies of the following: (i) any environmental studies or other documents; (ii) copies of any state agency correspondence regarding any environmental matters; and (iii) copies of any environmental permits, i.e. SPDES, NPDES, RCRA, MOSF/PBS licenses, etc.; and (iv) copies of all documents, reports, correspondence, etc. provided by or exchanged with Rubbermaid, Inc.
  16. Copies of site plan and/or utility maps depicting the property prepared before or after the property was developed.
- B. If Seller fails to deliver to Purchaser the documents set forth in Section A above within ten (10) business days following the effective date of the Purchase and Sale Agreement, the Due Diligence Period shall be extended one business day for each business day that Seller fails to deliver such documents.

## EXHIBIT B

### AGREEMENT FOR SALE AND PURCHASE OF PROPERTY

THIS AGREEMENT FOR SALE AND PURCHASE OF PROPERTY (the "Agreement") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_, an Iowa limited liability company, ("Seller"), having a mailing address of \_\_\_\_\_ and \_\_\_\_\_, a \_\_\_\_\_ ("Purchaser"), having offices at \_\_\_\_\_.

### RECITALS

A. Seller is the owner of a fee simple interest in the Premises (as such term is hereafter defined) and Seller is also the owner of all of the other Property (as such term is hereafter defined).

B. Seller desires to sell Seller's interests in the Property to Purchaser and Purchaser desires to purchase Seller's interests in the Property from Seller, each upon and subject to the terms and conditions of this Agreement.

THEREFORE, in consideration of and in reliance upon the above Recitals, the terms, covenants and conditions contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows:

#### 1.0 **PURCHASE AND SALE OF SELLER'S INTERESTS IN THE PROPERTY**

Subject to the terms and conditions of this Agreement, Seller shall sell and convey and Purchaser shall purchase the following described interests in property (all of which are hereinafter collectively referred to as the "Property"):

- 1.1 All right, title and interest of Seller in a certain parcel of approximately \_\_\_\_\_ which is part of a larger tract of improved real estate located at \_\_\_\_\_ consisting of approximately \_\_\_\_ acres in total, together with any and all easements, covenants, agreements, rights, privileges, tenements, hereditaments and appurtenances thereunto now or hereafter belonging or appertaining thereto including but not limited to the right to make all lot splits or divisions permitted under Iowa law (collectively, the "Land"), a depiction of which is attached as Exhibit 1.1 (a) and an accurate legal description of which shall be attached hereto as Exhibit 1.1(b) within ten (10) days after receipt by Purchaser of the Survey (as defined in Section 4.2.4 below); and
- 1.2 All right, title and interest of Seller (whether now or hereafter existing) in and to any land lying in the bed of any street, alley, road or avenue (whether open, closed or proposed) within, in front of, behind or otherwise adjoining the Land or any of it, and all right, title and interest of Seller (whether now or hereafter existing) in and to any award made or to be made as a result of or in lieu of condemnation,



and in and to any award for damage to the Property or any part thereof by reason of casualty (all of the foregoing being included within the term "Land"); and

- 1.3 All of the buildings, structures, fixtures, facilities, installations and other improvements, if any, of every kind and description now or hereafter in, on, over and under the Land, including, without limitation, any and all plumbing, air conditioning, heating, ventilating, mechanical, electrical and other utility systems, parking lots and facilities, landscaping, roadways, sidewalks, security devices, signs and light fixtures (collectively, the "Improvements") (the Land and Improvements being collectively referred to as the "Premises"); and
- 1.4 All fixtures and other tangible personal property of every kind and description situated in, on, over and under the Premises and used in connection therewith, in which Seller has an interest, if any, together with all replacements and substitutions therefor (together with the intangible personal property hereinafter identified, collectively, the "Personal Property"); and
- 1.5 All existing leases, if any, surveys, blueprints, drawings, plans and specifications, environmental studies or reports, soil borings or engineering tests, if any, for or with respect to the Property or any part thereof in Seller's possession; correspondence with past, present and prospective utility companies and other third parties, booklets and manuals concerning the Property or any part thereof in Seller's possession and such other existing books, records and documents (including, without limitation, those relating to real and personal property taxes, ad valorem or otherwise) used in connection with the operation of the Property or any part thereof in Seller's possession.
- 1.6 All right, title and interest of Seller in and to any service contracts for maintenance, repair and/or use of the Property, if any and the other intangible personal property now or hereafter owned by Seller or in which Seller has an interest, and used in connection with the Property or any part thereof, including, without limitation, all certificates of occupancy, permits, licenses, approvals of governmental authorities, claims, choses in action, leases and other contract rights (the "Service Contracts").

## 2.0 **PURCHASE PRICE**

The total consideration to be paid by Purchaser to Seller for Seller's interests in the Property is \_\_\_\_\_ Thousand Dollars (\$ \_\_\_\_\_ ) (subject however, to the closing adjustments required by this Agreement and credit for the Earnest Money referred to in Section 2.1) (the "Purchase Price").

### 2.1 **Earnest Money.**

Within three days of the date of this Agreement, Purchaser shall deliver to Iowa Title Guaranty Commercial, Attn: Matt Veldey ("Escrowee") a check payable to Escrowee's trust account, in the sum of Twenty One

Thousand Dollars (\$ \_\_\_\_\_ ) (together with all interest earned thereon as hereinafter provided, the "Earnest Money"). The Escrowee shall invest the Earnest Money in an interest-bearing savings account or short term U.S. Treasury Bills or similar cash equivalent securities as Purchaser directs. If the transaction contemplated by this Agreement closes in accordance with the terms and conditions of this Agreement, at Closing, the Earnest Money shall be delivered by the Escrowee to Seller as payment toward the Purchase Price. If the transaction fails to close due to a default on the part of Seller or if a contingency set forth in this Agreement for the benefit of Purchaser is not satisfied or removed, the Earnest Money shall be delivered by the Escrowee to Purchaser. If the transaction fails to close due to a default on the part of Purchaser, the Earnest Money shall be delivered by the Escrowee to Seller and, except for the provisions of Section 8.1 of this Agreement related to Purchaser's repair of damage to the Property (which shall survive the termination of this Agreement), the delivery of the Earnest Money to Seller upon Purchaser's default shall be Seller's sole and exclusive remedy, as more particularly provided for in Section 9.2 below.

## 2.2 Cash at Closing.

At Closing, Purchaser shall pay the Purchase Price referred to in Section 2.0 above by delivery of a cashier's check in the amount of Seven \_\_\_\_\_ (\$ \_\_\_\_\_ ) drawn on a local bank or federal funds wire transferred to an account designated by Seller in writing by notice received by Purchaser and the Title Guarantor (as defined below) not less than three (3) business days prior to the Closing Date (as such term is hereinafter defined), subject, however, to such adjustments as are required by this Agreement and credit for the Earnest Money referred to in Section 2.1 above (such amount, as adjusted, being referred to as the "Cash Balance").

## 3.0 **OPERATION OF PROPERTY THROUGH CLOSING**

Through the Closing Date (as the term is hereinafter defined):

- 3.1 Except as otherwise provided in this Section 3, Seller shall manage and operate the Property in accordance with Seller's existing practices and keep the Premises and the tangible Personal Property, if any, in good condition and repair, ordinary wear and tear excepted.
- 3.2 Seller shall not sell, enter into a new mortgage, pledge or hypothecation of, or otherwise transfer or dispose of all or any part of the Property or any interest therein, nor shall Seller initiate, consent to, approve or otherwise take any action with respect to zoning or any other governmental rules or regulations presently applicable to all or any part of the Property without Purchaser's consent, which consent may be granted or withheld in Purchaser's sole discretion.

- 3.3 Without the prior written consent of Purchaser (which consent shall not be unreasonably withheld or delayed), Seller shall not terminate, modify, extend, amend or renew any Service Contract or enter into any new Service Contract. Any new Service Contract entered into with Purchaser's consent shall be subject to the covenants, representations and warranties set forth in this Agreement with respect to Service Contracts. Notwithstanding the foregoing, on or before the Closing Date (as hereafter defined) Seller shall terminate any lease of any portion of the Property that Purchaser requests to be terminated; provided that Purchaser has not terminated this Agreement and further provided that Seller shall not be required to take any action to terminate such leases until after the expiration of the Inspection Period set forth in Section 8.1 below.
- 3.4 Seller shall comply with all federal, state, municipal and other governmental laws, ordinances, requirements, rules, regulations, notices and orders, and all agreements, covenants, conditions, easements and restrictions relating to the Property, including, without limitation, any such requirements, rules, regulations, notices or orders issued or imposed after the date of this Agreement and the payment of ad valorem property taxes with respect to the Property on a timely basis (i.e. on or before the date on which interest and/or penalties can be assessed.)
- 3.5 Seller shall promptly give written notice to the Purchaser of the occurrence of any event of which Seller is aware which affects the truth or accuracy of any representations or warranties made or to be made by Seller under or pursuant to this Agreement.
- 3.6 Purchaser shall have such access to the Property as is necessary for Purchaser to inspect the Property to assure that Seller is complying with the requirements of this Section 3; provided, however, that such access shall be governed by the provisions of Section 8.1 of this Agreement.

#### 4.0 **STATUS OF TITLE TO PROPERTY**

##### 4.1 State of Title.

At Closing, Seller shall convey to Purchaser or Purchaser's designee a fee simple interest in and to the Premises in accordance with the terms of this Agreement, subject only to: (i) applicable zoning ordinances, (ii) those easements, building and use restrictions, covenants, conditions and other restrictions of record which are acceptable to Purchaser in Purchaser's sole discretion and are reviewed and approved by Purchaser pursuant to Section 4.3 below and (iii) the lien of general real estate taxes for the fiscal year \_\_\_\_\_ and subsequent years which are not yet due (the above enumerated exceptions collectively referred to as the "Permitted Exceptions").

##### 4.2 Preliminary Evidence of Title.

Seller shall furnish Purchaser with the following documents to evidence the condition of Seller's title to the Property:

- 4.2.1 Within ten (10) days after the date of this Agreement, Seller, at Seller's expense, shall furnish to Purchaser an abstract of title continued or updated to the date of this Agreement (the "Abstract").
- 4.2.2 Within forty-five (45) days after the date of this Agreement, Purchaser may choose to obtain a commitment (the "Title Commitment") (including, to the extent not included in such Title Commitment, a special assessment search with respect to the Property) for the most current form of an ALTA Owner's Title Insurance Certificate (the "Title Certificate") proposing to guaranty Purchaser and committing to guaranty the Property in the amount of the Purchase Price, issued by Iowa Title Guaranty (the "Title Guarantor"). The Title Commitment shall be effective as of a date after the date of this Agreement and shall show fee simple title in Seller. The Title Certificate to be issued to Purchaser at Closing pursuant to Section 5.2.1(d) below shall provide gap coverage through the date of recording of the warranty deed from Seller to Purchaser and shall contain (a) an extended coverage endorsement over the so-called general or standard exceptions which are a part of the printed form of the policy (b) an ALTA 3.0 zoning endorsement, (c) an ALTA 9 endorsement with respect to minerals, restrictions and encroachments, (d) an access endorsement, (e) a contiguity endorsement and (f) such other endorsements as counsel for Purchaser shall reasonably deem appropriate. Purchaser shall be responsible for and shall pay to the Title Guarantor the search fees associated with the Title Commitment and the premium for the Title Certificate without standard exceptions including all endorsements and Purchaser shall be responsible and pay for the survey.
- 4.2.3 Within forty-five (45) days after the date of this Agreement, Purchaser, at Purchaser's expense, may choose to obtain searches (the "UCC Searches") conducted by a company reasonably acceptable to Purchaser of the records of the Polk County, Iowa Recorder and the Iowa Secretary of State for Uniform Commercial Code Financing Statements in the names of Seller, the Property, or any other name reasonably requested by Purchaser.
- 4.2.4 Within forty-five (45) days after the date of this Agreement, Purchaser shall obtain a current plat of survey (the "Survey") of the Property dated after the date of this Agreement, certified to Purchaser and the Title Guarantor (and such other persons or entities as Purchaser may reasonably designate) by a surveyor registered in the State of Iowa and prepared in accordance with the Minimum Standard Detail Requirements for Land Title Surveys as jointly established by the American Land Title Association and American Congress on Surveying and Mapping (2011 version) including Table A Item Nos. 1, 2, 6(a), 6(b), 7(a), 7(b)(1), 7(c), 8, 11(a), 11(b), 16, 17 and 20(a) which meets the accuracy requirements of a

Class A Survey as defined therein and which includes such other standards as the Title Company and the Purchaser may require as a condition to the removal of any survey exception from the Title Certificate. The Survey shall also contain the surveyor's certification that the Premises are not located in any area designated by any governmental agency or authority as being a flood-prone or flood-risk area, whether pursuant to the Flood Disaster Act of 1973, as amended, or otherwise, and that the requirements of the National Flood Insurance Program are not applicable to the Premises.

- 4.2.5 Within ten (10) days after the date of this Agreement, Seller shall furnish to Purchaser copies of all of the documents in Seller's possession related to the Property, including but not limited to those described in Sections 1.5 and 1.6 of this Agreement (collectively the "Property Documents").

#### 4.3 Title Defects.

If the Abstract, Title Commitment, the UCC Searches, the Survey or the Property Documents (or any revision or update of any of them) discloses (i) exceptions to title other than Permitted Exceptions or existing encumbrances in an aggregate amount less than the Purchase Price which Seller shall discharge on or before Closing either by payment or credit against the Purchase Price or (ii) any other matter which does not conform to the requirements of this Agreement, Purchaser shall so notify Seller within thirty (30) days of Purchaser's receipt of the Abstract, Title Commitment, UCC Searches, Survey or the Property Documents and Seller shall have thirty (30) days from the date of such notice to have each such unpermitted exception to title removed or to correct each such other matter, in each case to the reasonable satisfaction of Purchaser. If within the time specified Seller fails to have each such unpermitted exception removed or correct each such other matter as aforesaid, Purchaser may, at its option, and in addition to all other rights and remedies available to Purchaser under or pursuant to this Agreement, either (i) terminate this Agreement and immediately receive from the Escrowee the Earnest Money, in which event this Agreement, without further action of the parties, shall become null and void and neither party shall have any further rights or obligations under this Agreement, or (ii) elect to accept title to the Property in its then current status with the right to deduct from the Purchase Price a sum equal to the amount required to discharge liens or encumbrances of a definite or ascertainable amount. If Purchaser fails to make either such election and elects not to pursue its other rights and remedies as aforesaid, Purchaser shall be deemed to have elected option (i).

#### 5.0 CLOSING

##### 5.1 Closing Date.

The "Closing" of the transaction contemplated by this Agreement (that is, the payment of the Cash Balance by Purchaser to Seller, the transfer by Seller to Purchaser of a fee simple interest in the Premises, and the satisfaction of all other terms and conditions of this Agreement) shall occur at a time mutually agreed upon by Seller and Purchaser within fifteen (15) days after the end of the

Inspection Period set forth in Section 8.0 below, as it may be extended, (provided that neither Seller nor Purchaser has terminated this Agreement due to the other party's default or otherwise in accordance with Section 8.0) at the offices of the Title Guarantor or at such other time and place as Seller and Purchaser shall agree upon in writing. The "Closing Date" shall be the date of Closing. If the Closing Date above provided for falls on a Saturday, Sunday or legal holiday, the Closing Date shall be the next business day.

## 5.2 Closing Documents.

5.2.1 Seller. Not later than three (3) business days prior to the Closing Date, Seller shall deliver to Purchaser a copy of each of the following (the original of each in form and substance acceptable to Purchaser if not attached as an Exhibit to this Agreement, to be executed [if necessary] and delivered at Closing):

- (a) a general warranty deed of Seller to Purchaser subject only to the Permitted Exceptions sufficient to transfer and convey good and marketable fee simple title to the Premises to Purchaser upon payment in full of the Purchase Price as required by this Agreement, and otherwise in form acceptable to the Title Guarantor;
- (b) a general warranty bill of sale sufficient to transfer to Purchaser or Purchaser's designee title to the Personal Property, if any, and containing appropriate warranties of title and condition as required by this Agreement;
- (c) any and all affidavits, certificates or other documents required by the Title Guarantor in order to cause it to issue the Title Certificate in the form and condition required by this Agreement;
- (d) an assignment and assumption of those Service Contracts, if any, which are assignable and of which Purchaser elects to take an assignment, which election Purchaser must provide written notice of to Seller at least fifteen (15) days prior to Closing;
- (e) all of the original written Service Contracts, if any, and any and all leases, if any, blueprints, soil borings, building plans, surveys, site plans, engineering plans and studies, utility plans, landscaping plans, development plans, specifications, drawings and other documentation concerning all or any part of the Property and in possession or control of Seller;
- (f) terminations of all of the leases, if any, of any portion of the Property for which Purchaser has requested termination signed by Seller and the particular tenant;

- (g) assignments of any bonds, warranties or guaranties which are in any way applicable to the Property or any part thereof;
- (h) at Closing, all keys and security codes, if any, for the Property, with identification of the lock to which each key or security codes relates;
- (i) all other documents reasonably required by Purchaser in order to evidence Seller's power and authority to sell the Property and to perfect the conveyance, transfer and assignment of the Property to Purchaser or Purchaser's designee (including, without limitation, an assignment of general intangibles); and
- (j) a closing statement showing the computation of the funds payable to Seller pursuant to this Agreement.

5.2.2 Purchaser. Not later than three (3) business days prior to the Closing Date, Purchaser shall deliver to Seller a copy of each of the following (the original of each in form and substance reasonably acceptable to Seller if not attached as an Exhibit to this Agreement, to be executed [if necessary] and delivered at Closing: all documents reasonably required by Seller in order to evidence Purchaser's power and authority to consummate the transaction contemplated by this Agreement.

5.2.3 Purchaser. Purchaser shall deliver or cause to be delivered to Seller the following at Closing:

- (a) the Cash Balance;
- (b) an assignment and assumption of those Service Contracts, if any, which are assignable and of which Purchaser elects to take an assignment; and
- (c) a closing statement showing the computation of the funds payable to Seller pursuant to this Agreement.

### 5.3 Closing Prorations and Adjustments.

5.3.1 A statement of prorations and other adjustments shall be prepared by Seller in conformity with the provisions of this Agreement and then submitted to Purchaser for review and approval not less than three (3) business days prior to the Closing Date. For purposes of prorations, Purchaser shall be deemed the owner of the Property on the Closing Date. In addition to prorations and other adjustments that may otherwise be provided for in this Agreement, the following items are to be prorated or adjusted, as the case may require, as of the Closing Date:

- (a) Fiscal year \_\_\_\_\_ real property taxes shall be prorated based upon the Closing Date with Seller being responsible for the taxes for any portion of the period from \_\_\_\_\_ to \_\_\_\_\_ occurring prior to the Closing Date
- (b) Fiscal year \_\_\_\_\_ real property taxes shall be prorated based upon the Closing Date with Seller being responsible for the taxes for any portion of the period from \_\_\_\_\_ to \_\_\_\_\_ occurring prior to the Closing Date.
- (c) All special assessments, if any, shall be paid by Seller prior to or at Closing.
- (d) water, electric, telephone and all other utility and fuel charges, fuel on hand (at cost plus sales tax and minus a reasonable sludge factor, if appropriate), and any assignable deposits with utility companies (to the extent possible, utility prorations will be handled by meter readings on the Closing Date);
- (e) rents under any leases or occupancy contracts with respect the Property, if any;
- (f) amounts due and prepayments under the Service Contracts;
- (g) assignable license and permit fees; and
- (h) other expenses of operation and similar items.

Any proration (e.g. real property taxes) which must be estimated at Closing shall be re-prorated and finally adjusted as soon as practicable after the Closing Date upon receipt of tax bills for the relevant time period; otherwise all prorations shall be final.

#### 5.4 Closing Costs.

Seller shall pay for (a) transfer taxes, documentary stamps, intangible taxes and similar taxes or charges, (b) all fees associated with continuing or updating the Abstract, (c) all fees and charges associated with obtaining a lot split or land division of the Land from Seller's larger parcel of property (which includes the Land), including but not limited to municipal fees, survey costs and attorney fees, (d) all broker commissions or charges (as set forth in Section 10.11 below) and (e) all recording charges other than the recording fees for the warranty deed from Seller to Purchaser and the recording fees associated with any documents related to financing of the acquisition of the Premises by the Purchaser. Purchaser shall pay for (a) the costs of all environmental site assessments, (b) any Property inspection costs, (c) title search fees related to the Title Commitment and title insurance premiums for the Title Certificate and any endorsements, (d) the costs of the Survey, (e) the recording fees for the Warranty Deed, and (f) any costs related to Purchaser's financing. Seller and Purchaser shall, however, be



responsible for (i) the fees of their respective attorneys, accountants and advisors and (ii) one-half (1/2) of any costs incurred with respect to any escrow or Title Guarantor closing fees.

#### 5.5 Possession.

Upon Closing, Seller shall deliver to Purchaser full and complete possession of the Property, subject only to the Permitted Exceptions.

### 6.0 CASUALTY LOSS AND CONDEMNATION

If, prior to Closing, the Property or any part thereof shall be condemned, or destroyed or materially damaged by fire or other casualty (that is, damage or destruction which Purchaser reasonably believes could be in excess of \$25,000.00), Purchaser shall have the option either to terminate this Agreement or to consummate the transaction contemplated by this Agreement notwithstanding such condemnation, destruction or material damage.

If the Purchaser elects to consummate the transaction contemplated by this Agreement and if the Seller, as of the Closing Date, has not received the insurance proceeds or condemnation proceeds related to such damage, destruction or condemnation, then Seller, at Closing, shall assign all insurance claims pertaining to such damage or destruction and all rights to condemnation proceeds to Purchaser by executing and delivering to Purchaser all required proofs of loss, assignments of claim and/or proceeds and other similar items. If the Purchaser elects to consummate the transaction contemplated by this Agreement and if the Seller, as of the Closing Date, has received the insurance proceeds or condemnation proceeds related to such damage, destruction or condemnation, then Seller, at Closing, shall allow Purchaser a credit against the Purchase Price in an amount equal to the amount of insurance proceeds (together with an amount equal to any deductible(s) and uninsured amounts) or condemnation proceeds received by the Seller prior to Closing.

If Purchaser elects to terminate this Agreement, this Agreement shall, without further action of the parties, become null and void and neither party shall have any rights or obligations under this Agreement, except for those obligations which specifically survive termination of this Agreement.

If there is any other damage or destruction (that is, damage or destruction which Purchaser reasonably believes could be \$25,000.00 or less) to the Property or any part thereof, Seller shall either repair such damage prior to Closing or, at Purchaser's option, either assign all insurance claims pertaining to such damage or destruction to Purchaser by executing and delivering to Purchaser at Closing and thereafter all required proofs of loss, assignments of claims and other similar items or allow Purchaser a credit against the Purchase Price in an amount equal to the reasonably estimated cost of a repair. If Purchaser elects to take an assignment of all insurance claims as provided for in this Section 6, Purchaser shall receive at Closing a credit against the Purchase Price in an amount equal to any deductible(s) and uninsured amounts applicable thereto.

### 7.0 REPRESENTATIONS AND WARRANTIES

- 7.1 Seller represents and warrants to Purchaser that the following are true, complete and correct as of the date of this Agreement (unless otherwise indicated):
- 7.1.1 Except for any existing mortgages executed and recorded prior to the date of this Agreement and this Agreement, Seller has not entered into any agreement to lease, sell, mortgage or otherwise encumber or dispose of Seller's interest in the Property or any part thereof.
  - 7.1.2 Seller has not leased or otherwise granted to any person other than Purchaser the right to use or occupy the Property or any portion thereof.
  - 7.1.3 There are no outstanding options, rights of first offer or rights of first refusal to purchase the Property or any portion thereof or interest therein.
  - 7.1.4 To the best of Seller's knowledge, there is no condemnation, expropriation or other proceeding in eminent domain, pending or threatened, affecting the Property or any portion thereof or interest therein. To the best of Seller's knowledge, there is no injunction, decree, order, writ or judgment outstanding, nor any claims, litigation, administrative action or similar proceedings, pending or threatened, naming Seller or the Property, relating to the ownership, lease, use or occupancy of the Property or any portion thereof.
  - 7.1.5 To the best of Seller's knowledge, the Property is in material compliance with all applicable building, zoning, subdivision, health and safety and other land use laws and all insurance requirements affecting the Property (collectively, the "Real Property Laws"). Seller has not received any notice of violation of any Real Property Law and, to the best of Seller's knowledge, there is no basis for the issuance of any such notice or the taking any action for such violation.
  - 7.1.6 Seller has not received any notice from any governmental authority or other entity having jurisdiction over the Property threatening a suspension, revocation, modification or cancellation of any permit or license related to occupancy or use of the Property and, to the best of Seller's knowledge, there is no basis for the issuance of any such notice or the taking of any such action.
  - 7.1.7 To the best of Seller's knowledge, the current use and occupancy of the Real Property does not violate in any material respect any easement, covenant, condition, restriction or similar provision in any instrument of record or other unrecorded agreement affecting the Property (the "Encumbrance Documents"). Seller has not received any notice of violation of any Encumbrance Documents and, to the best of Seller's knowledge, there is no basis for the issuance of any such notice or the taking of any action for such violation.

- 7.1.8 The Service Contracts comprise every contract, agreement, relationship and commitment, oral or written, which affects the Property, to which Seller is a party, or by which it is bound. Neither Seller nor any other party is in default under the terms of any Service Contract. Except as otherwise noted on Exhibit 1.6, each Service Contract is cancelable without payment of any premium or penalty upon not more than thirty (30) days notice.
- 7.1.9 Seller is duly qualified and empowered to conduct Seller's business, and has full power and authority to enter into and fully perform and comply with the terms of this Agreement. Neither the execution and delivery of this Agreement nor its performance by Seller will conflict with or result in the breach of any contract, agreement, rule or regulation to which Seller is a party or by which Seller is bound.
- 7.1.10 This Agreement is valid and enforceable against Seller in accordance with its terms and each instrument to be executed by Seller pursuant to this Agreement or in connection herewith will, when executed and delivered, be valid and enforceable against Seller in accordance with its terms, subject only to applicable bankruptcy, reorganization, moratorium, insolvency or other similar laws affecting the enforcement of creditors' rights generally and the application of equitable principles.
- 7.1.11 As of Closing, to the best of Seller's knowledge and except as disclosed in the environmental site assessment reports referred to in Section 8.4 hereof there are not now, and have not been any explosives, radioactive materials, pesticides, hazardous materials, hazardous wastes, hazardous or toxic substances, polychlorinated biphenyls or related or similar materials, asbestos or any material containing asbestos, or any other substance or material as may be defined as a "Hazardous Substance" or toxic substance by any environmental law, ordinance, rule or regulations of any governmental authority (collectively "Hazardous Materials"), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Section 1801, et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 6901 et. seq.), the Federal Water Pollution Control Act (33 U.S.C. Sections 1251 et seq.), the Clean Air Act (42 U.S.C. Sections 7401 et seq.) and any Iowa environmental statutes ("Environmental Laws") and in the regulations adopted and publications promulgated pursuant thereto, at the Property in amounts or concentrations in excess of those permitted under applicable law or under circumstances that violate Environmental Laws and that there are not now, and have not been any underground or above ground storage tanks on the Premises, any which contain gasoline, petroleum products, explosives, flammable or combustible materials, liquid industrial waste, any

Hazardous Materials or any materials regulated under Environmental Laws.

7.1.12 The words “to Seller’s knowledge”, “to the best of Seller’s knowledge” or words of similar import mean the actual knowledge of Seller after appropriate inquiry of documents in Seller’s possession and available public records.

7.2 Seller represents and warrants to Purchaser that, as of the Closing, each of the warranties and representations set forth in Section 7.1 above shall be true, complete and correct except for changes in the operation of the Property occurring prior to Closing which are specifically permitted by or pursuant to this Agreement.

7.3 The foregoing warranties and representations of Seller shall survive the execution and delivery of this Agreement, the Closing and delivery of all documents and any and all performances in accordance with this Agreement. The foregoing warranties and representations shall not be affected by any investigation or verification made by or on behalf of Purchaser prior to Closing.

## 8.0 **CONDITIONS PRECEDENT**

### A. Purchaser’s Conditions Precedent

At the option of Purchaser, the obligations of Purchaser to purchase the Property under the terms of this Agreement are contingent and conditional upon the satisfaction of all of the following conditions, the failure of any of which shall, at the request of the Purchaser, render this Agreement null and void and neither party shall have any rights or obligations under this Agreement except for those obligations which are specifically stated to survive the termination of this Agreement.

8.1 Purchaser shall have ninety (90) days after the date of this Agreement within which to inspect the Property (the “Inspection Period”). If, during the Inspection Period, Purchaser determines that the Property is unsuitable for Purchaser’s purposes for any reason whatsoever, including but not limited to the following specific reasons:

- (i) any defects in title (as reflected by the Title Commitment, UCC Searches, Survey or Property Documents);
- (ii) environmental problems as identified in the environmental site assessment reports referred to in Section 8.4 below;
- (iii) any difficulties with respect to the Purchaser's proposed use of the Premises (including, but not limited to, percolation, soil conditions, zoning, parking, utility consumption, utility availability, buildable acreage, occupancy, alley vacation, lot split approval and site plan approval);

- (iv) any defects in the physical condition of the Property;
- (v) any issues or problems identified with respect to the Service Contracts (including the leases);and
- (vi) inability of Purchaser to obtain approval for its proposed development of the Property from third parties, including but not limited to any third party franchisor

and notifies Seller of such decision prior to 5:00 p.m., Eastern Time, on the last day of the Inspection Period, at which time this Agreement shall be null and void and neither party shall have any rights or obligations under this Agreement, except for those obligations which are specifically stated to survive any termination of this Agreement.

Notwithstanding the provisions of this Section 8.1 to the contrary, if Purchaser elects to obtain a Phase II environmental site assessment in accordance with the provisions of Section 8.4 below and has not received the Phase II environmental site assessment report and findings within the Inspection Period or if Purchaser has not obtained final site plan approval by both applicable municipalities and governmental authorities and third parties (including but not limited to third party franchisors [e.g. Taco Bell Corp.]) for development of a drive-thru fast food restaurant on the Premises ("Final Approval") prior to the expiration of the Inspection Period, or if Seller, at Seller's sole cost and expense, has not obtained all required governmental approvals for a lot split of the Land from Seller's adjoining property (the "Lot Split Approval") then Purchaser shall be entitled to extend the Inspection Period for an additional thirty (30) days solely with respect to obtaining receipt of (a) the Phase II environmental site assessment report and findings (b) Final Approval and/or (c) the Lot Split Approval. If Purchaser notifies Seller that Purchaser has not received (a) a Phase II environmental site assessment report and findings, (b) Final Approval and /or (c) the Lot Split Approval prior to the end of the extended Inspection Period, then Purchaser shall be entitled to terminate this Agreement, at which time this Agreement shall be null and void and neither party shall have any rights or obligations under this Agreement, except for those obligations which specifically survive termination of this Agreement.

If Purchaser shall fail to either (i) object to the results of Purchaser's inspections prior to the expiration of the initial Inspection Period for any reason other than failure to receive a Phase II environmental site assessment report and findings, the Final Approval and/or the Lot Split Approval or (ii) terminate this Agreement prior to the expiration of the extended Inspection Period due to the Purchaser's inability or failure to receive a Phase II environmental site assessment report and findings, Final Approval and/or the Lot Split Approval prior to the expiration of the extended Inspection Period, then Purchaser shall have waived its right to terminate this Agreement in accordance with this Section 8.1.

From the date of this Agreement through Closing, Purchaser and its agents, engineers, surveyors, appraisers, auditors and other representatives shall have the right to enter upon the Premises to inspect, examine, survey, obtain engineering inspections, appraise and otherwise do that which, in the reasonable opinion of Purchaser, is necessary to determine the boundaries, acreage and condition of the Property and to determine the suitability of the Property for the uses intended by Purchaser (including, without limitation, inspect, review and copy any and all documents in the possession or control of Seller, its agents, contractors or employees, and which pertain to the construction (including subsurface structures, if a Phase II environmental site assessment is performed), ownership, use, occupancy or operation of the Property or any part thereof). Also during such time period, Seller shall make all of Seller's books, files and records relating in any way to the Property available for examination by Purchaser and Purchaser's agents and representatives, who shall have the right to make copies of such books, files and records and to extract therefrom such information as they may desire.

Purchaser agrees to, and shall indemnify, defend, and hold harmless Seller and its officers, members, managers, agents, representatives, affiliates, contractors and employees from and against any and all damages, losses, costs, claims, liabilities, expenses, demands and obligations, of any kind or nature whatsoever (including reasonable attorneys' fees and costs) arising out of or resulting from the entry onto the Premises and/or the conduct of any due diligence activities on the Premises by Purchaser or any of Purchaser's affiliates, employees, officers, agents, representatives or contractors, or caused by the acts or omissions of Purchaser or its affiliates, employees, officers, agents, representatives or contractors, at any time prior to the Closing Date. In the event that any portion of the Property is damaged, disturbed or altered by virtue of Purchaser's investigations or due diligence activities, Purchaser will, at its sole cost and expense, repair any damage to the Property caused by Purchaser's activities upon the Property to the same or better condition as existed immediately prior to such damage occurring on the Property. All of the obligations of Purchaser under this Section 8.1 will survive both the consummation of the sale contemplated hereunder and any earlier termination of this Agreement.

- 8.2 Each and every representation and warranty of Seller is true, correct and complete as of Closing.
- 8.3 As of Closing, Seller shall have fully performed and satisfied each and every obligation, term, and condition to be performed and satisfied by Seller under this Agreement.
- 8.4 Purchaser shall obtain a Level I environmental site assessment and report ("Phase I ESA") in form and content approved by Purchaser and Purchaser's prospective lender prepared by a qualified environmental consulting firm approved by Purchaser and Purchaser's prospective lender with respect to an inspection and testing of the Property within forty-five (45) days after the date of this Agreement. Purchaser shall bear the cost of the Phase I ESA. If such Phase I ESA, in

Purchaser's sole and reasonable judgment, discloses the presence of amounts or concentrations of Hazardous Materials on the Property (in excess of those amounts or concentrations, if any, permitted by law), or the likelihood of the presence of such amounts or concentrations of Hazardous Materials on the Property, or the need to investigate further the Property or adjacent property for the presence of such amounts or concentrations of Hazardous Materials, then Purchaser shall have the option of either (i) obtaining, at Purchaser's sole cost and expense, a Phase II environmental site assessment ("Phase II ESA") of the Property within forty-five (45) days of the date of Purchaser's receipt of the Phase I ESA, or (ii) terminating this Agreement. If Purchaser elects to obtain a Phase II ESA and such Phase II ESA discloses the presence of amounts or concentrations of Hazardous Materials on the Property (in excess of those amounts or concentrations, if any, permitted by local, state and/or federal law), then Purchaser shall have the following options:

(i) proceeding with the Closing; or

(ii) receiving an indemnity and hold harmless agreement from Seller indemnifying Purchaser from any liability, cost, damage and expense related to:

1. any third party claims for matters relating to pre-closing use of the Property noted in the Phase II environmental site assessment report and findings, and

2. the cost or expense required to implement a "due care plan" prepared by the "engineering firm" and complying with "Environmental Laws." or

(iii) terminating this Agreement.

8.5 As of Closing, Purchaser shall have received final approval from Taco Bell Corp. for construction and operation of a drive-thru fast food restaurant on the Land.

B. Seller's Conditions Precedent

8.6 At the option of the Seller, the obligations of Seller under this Agreement are contingent and conditional upon the satisfaction of all of the following conditions, the failure of any of which shall, at the request of Seller, render this Agreement null and void:

(a) as of Closing, Purchaser shall have fully performed and satisfied each and every obligation, term and condition to be performed and satisfied by Purchaser.

9.0 **DEFAULTS AND REMEDIES**

9.1 Notwithstanding anything to the contrary contained in this Agreement, if Seller fails to perform in accordance with the terms of this Agreement, at Purchaser's

option (a) Purchaser may terminate this Agreement in which case the Earnest Money shall be returned to Purchaser and (b) Purchaser may sue Seller for damages or (c) Purchaser may sue for specific performance of this Agreement. Purchaser's right to terminate this Agreement and to sue Purchaser for damages shall be cumulative.

- 9.2 Notwithstanding anything to the contrary contained in this Agreement, if Purchaser fails to perform in accordance with the terms of this Agreement, the Earnest Money shall be forfeited to Seller as liquidated damages (which shall be Seller's sole and exclusive remedy against Purchaser), at which time this Agreement shall be null and void and neither party shall have any rights or obligations under this Agreement. Seller acknowledges and agrees that (1) the Earnest Money is a reasonable estimate of and bears a reasonable relationship to the damages that would be suffered and costs incurred by Seller as a result of having withdrawn the Property from sale and the failure of Closing to occur due to a default of Purchaser under this Agreement; (2) the actual damages suffered and costs incurred by Seller as a result of such withdrawal and failure to close due to a default of Purchaser under this Agreement would be extremely difficult and impractical to determine; (3) Purchaser seeks to limit its liability under this Agreement to the amount of the Earnest Money in the event this Agreement is terminated and the transaction contemplated by this Agreement does not close due to a default of Purchaser under this Agreement; and (4) the Earnest Money shall be and constitute valid liquidated damages.

## 10.0 **MISCELLANEOUS**

- 10.1 Neither this Agreement nor any interest hereunder shall be assigned or transferred by Seller. Purchaser may assign or otherwise transfer Purchaser's interest under this Agreement to an entity formed prior to the Closing Date in which Purchaser has a majority ownership interest upon Seller's prior written consent to such assignment or transfer, which shall not be unreasonably withheld or delayed and, upon consummation of such assignment, Purchaser, as assignor, shall have no further obligation or liability under the terms of this Agreement and the assignee entity shall assume the rights and obligations of Purchaser under this Agreement. As used in this Agreement, the term "Purchaser" shall be deemed to include any assignee or other transferee of the initial Purchaser. Subject to the foregoing, this Agreement shall inure to the benefit of and shall be binding upon Seller and Purchaser and their respective successors and assigns.
- 10.2 This Agreement (including the documents referred to herein) constitutes the entire agreement between the parties and supersedes any prior understandings, agreements or representations by or between the parties, written or oral, to the extent they relate in any way to the subject matter hereof.
- 10.3 No amendment of any provision of this Agreement shall be valid unless the same is in writing and signed by Seller and Purchaser. No waiver by any party of any provision of this Agreement or any default, misrepresentation, or breach of



warranty or covenant hereunder, whether intentional or not, shall be valid unless the same shall be in writing and signed by the party making such waiver nor shall such waiver be deemed to extend to affect in any way any rights arising by virtue of any prior or subsequent such default, misrepresentation or breach of warranty or covenant.

10.4 This Agreement constitutes an offer by Purchaser (which shall not be revocable by Purchaser prior to \_\_\_\_\_ and which must be accepted by Seller on or before \_\_\_\_\_). If the Agreement is not so accepted and returned to Purchaser, this offer shall be deemed revoked. The date of this Agreement shall be the date on which Seller signs this Agreement as indicated below the signature line for Seller.

10.5 Time is of the essence of this Agreement. In the computation of any period of time provided for in this Agreement or by law, the day of the act or event from which the period of time runs shall be excluded, and the last day of such period shall be included, unless it is a Saturday, Sunday or legal holiday, in which case the period shall be deemed to run until the end of the next day which is not a Saturday, Sunday or legal holiday.

10.6 All notices, requests, demands or other communications required or permitted under this Agreement shall be in writing and delivered personally or by certified mail, return receipt requested, postage prepaid, or by telecopy or other facsimile transmission or by recognized overnight courier (e.g. Federal Express, UPS Next Day Air), addressed as follows:

10.6.1 If to Seller:

10.6.2 If to Purchaser:

With a copy to:

All notices given in accordance with the terms hereof shall be deemed received forty-eight (48) hours after posting if sent by certified mail or on the date of delivery, when delivered personally, by facsimile transmission or by overnight courier. Any party hereto may change the address for receiving notices, requests, demands or other communication by notice sent in accordance with the terms of this Section 10.7.

10.7 This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Iowa without giving effect to any choice or conflict of law provision or rule (whether of the State of Iowa or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Iowa.

10.8 At Closing, Seller shall deliver to Purchaser an affidavit stating, under penalty of perjury, Seller's respective U.S. taxpayer identification numbers and that Seller is not a foreign person within the meaning of Section 1445 of the Internal Revenue Code. The purpose of this affidavit is to assure Purchaser that the withholding of

taxes by Purchaser is not required by Section 1445 upon Seller's disposition of the Property, and such certification shall be in form prescribed by said Section or regulations promulgated pursuant thereto. If Seller does not deliver such an affidavit to Purchaser at Closing, or if Purchaser has actual knowledge or receives notice that the affidavit is false, then, in either such event, Purchaser shall be entitled to withhold from Seller an amount equal to ten percent (10%) of the Purchase Price, which amount Purchaser shall report and pay over to the Internal Revenue Service within ten (10) days after Closing as required by the Internal Revenue Code or regulations promulgated pursuant thereto.

- 10.9 This Agreement may be executed in any number of identical counterparts (including by means of facsimile), any or all of which may contain the signatures of fewer than all of the parties but all of which shall be taken together as a single instrument.
- 10.10 In the event, prior to Closing, either Seller or Purchaser shall desire to restructure this transaction as a tax deferred exchange for property identified by Seller or Purchaser, as the case may be, pursuant to Section 1031 of the Internal Revenue Code, Seller, as an accommodation to Purchaser, or Purchaser, as an accommodation to Seller, shall enter into and execute any such amendatory documentation as Purchaser or Seller may reasonably request; provided, however, that the party not requesting the exchange shall not incur any additional cost, expense, risk or potential liability whatsoever on account thereof, and the party requesting the exchange shall indemnify and hold the party not requesting the exchange harmless from all costs, legal fees and damages such non-requesting party incurs due to or arising out of performance or attempted performance of this Section 10.10. The party not requesting the exchange shall have no liability to the party requesting the exchange whatsoever in the event the subject transaction is found, held or adjudicated not to qualify as or as part of a tax deferred exchange pursuant to Section 1031 of the Internal Revenue Code. Notwithstanding the foregoing, no failure to close any transaction involving any premises to be exchanged shall affect Seller's obligation to sell the Property and/or Purchaser's obligation to purchase the Property as and when required hereunder.
- 10.11 The parties represent and warrant to each other that they have not dealt with any real estate broker or agent who would be entitled to a brokerage commission or finders fee as a result of this Agreement other than the following real estate broker(s) whose commission (6% commission) shall be paid at closing by Seller:

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Each party hereto agrees to indemnify and hold the other harmless of and from any and all claims for commissions or broker's or finder's fees claiming by, through or under the indemnifying party, including any damages, costs or attorneys' fees related to any such claim. If a commercial real estate broker representing Seller files a claim of lien against the Property in accordance with the provisions of any applicable Iowa law, at Closing, notwithstanding the provisions

of such law to the contrary, Seller, Purchaser and the Title Guarantor shall establish an escrow account from the proceeds of the transaction and/or from Seller's funds in an amount sufficient to satisfy the lien or liens. The escrow account shall be funded by Seller in the amount of the lien or liens claimed by the broker or brokers representing Seller. The funds deposited in the escrow account shall remain in the escrow account until the rights to the funds have been determined by written agreement of Seller and Purchaser, a judgment or order by a court of competent jurisdiction or any other method agreeable to Seller and Purchaser. Purchaser shall not unreasonably refuse to execute such written agreement in the case where the broker entitled to the escrowed commission amount and the party responsible for paying such amount (i.e. Seller) have executed the written agreement.

- 10.12 Seller and Purchaser agree that, if any dispute arises out of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney fees and costs from the other party.
- 10.13 No party shall issue any press release or make any public announcement relating to the subject matter of this Agreement prior to the Closing without the prior written approval of the other party; provided, however, that any party may make any public disclosure it believes in good faith is required by applicable law or any listing or trading agreement concerning its publicly-traded securities (in which case the disclosing party will use its reasonable best efforts to advise the other party prior to making the disclosure).
- 10.14. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.
- 10.15 The parties have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context required otherwise. The word "including" shall mean including without limitation. Nothing in any Exhibit to this Agreement shall be deemed adequate to disclose an exception to a representation or warranty made herein unless the Exhibit identifies the exception with particularity and describes the relevant facts in detail. Without limiting the generality of the foregoing, the mere listing (or inclusion of any copy) of a document or other item shall not be deemed adequate to disclose an exception to a representation or warranty made herein (unless the representation or warranty has to do with the existence of the document or other item itself). The parties intend that each presentation, warranty and covenant contained herein shall have independent significance. If any party has breached any representation, warranty or covenant contained herein in any respect, the fact that there exists another

representation, warranty or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the Party has not breached shall not detract from or mitigate the fact that the Party is in breach of the first representation, warranty or covenant.

- 10.16 The Exhibits identified in this Agreement are incorporated herein by reference and made a part hereof.
- 10.17 Each of the parties submits to the exclusive jurisdiction of the courts of the State of Iowa or the courts of the United States of America located in the State of Iowa, for any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceeding may be heard and determined in any such court. Each party also agrees not to bring any action or proceeding arising out of or relating to this Agreement in any other court. Each of the parties waives any defense of inconvenient forum to the maintenance of any action or proceeding so brought and waives any bond, surety or other security that might be required of any other party with respect thereto.
- 10.18 Seller hereby grants Purchaser the right to record a memorandum of this Agreement with respect to the Premises to provide record notice of Purchaser's rights under this Agreement.
- 10.19 To the extent that Seller's cooperation is required in connection with any governmental approvals sought by Purchaser with respect to its proposed use of the Premises (e.g. site plan approval, lot split approval, re-zoning, etc.), Seller agrees to use its best efforts to provide such cooperation; provided however, that all reasonable costs of such cooperation (e.g. application fees, survey costs, engineering fees, etc.) shall be borne by Purchaser.

#### **LIST OF EXHIBITS**

Exhibit 1.1(a) --Depiction of the Land

Exhibit 1.1(b)--Legal Description

Exhibit 1.6 -- Service Contracts

**Exhibit 1.1(b)**

**Legal Description**

Land situated in the City of \_\_\_\_\_, County of Polk and State of Iowa, more particularly described as follows:

Commonly known as:

Tax Parcel Identification No.:

(02261664)

## EXHIBIT C

### TENANT ESTOPPEL CERTIFICATE

Date: \_\_\_\_\_, 20\_\_

- Lease dated \_\_\_\_\_, as amended by \_\_\_\_\_, between \_\_\_\_\_, an Iowa \_\_\_\_\_ ("**Landlord**") and \_\_\_\_\_, a \_\_\_\_\_ ("**Tenant**")
- Premises: \_\_\_\_\_ consisting of approximately \_\_\_\_\_ rentable square feet
- Commencement Date: \_\_\_\_\_ Expiration Date: \_\_\_\_\_
- Security Deposit: NONE.
- Renewal Options: \_\_\_\_\_.
- Current Monthly Base Rent (excluding overage rent, and expense reimbursements): \_\_\_\_\_
- Rental Payments Commenced: \_\_\_\_\_.
- Monthly Base Rent Paid Through: \_\_\_\_\_.

The undersigned, Tenant under the above-described lease ("**Lease**"), hereby confirms and certifies to Lender, as of the date hereof, that all information contained in this certificate is true and correct:

1. The Lease is in full force and effect, has not been modified or amended, and is enforceable in accordance with its terms except for:

2. To the best of Tenant's actual knowledge, all duties of Landlord under the Lease have been fulfilled and all other obligations required to be performed or observed by Landlord have been duly and fully performed or observed by Landlord, including, without limitation, the satisfaction of Landlord's obligation to provide a tenant improvement allowance to Tenant, if any.

3. Tenant has accepted possession and is in full and complete occupancy of the Premises without any existing conditions or qualifications. The buildings, improvements, space, and any common areas (if applicable) to be furnished or provided by the terms of the Lease have been completed in all respects to the satisfaction of the Tenant, and the existing parking satisfies any applicable Lease requirements.

4. Tenant has neither assigned, transferred, nor encumbered the Lease, or any interest therein, nor sublet the Premises, or any portion thereof, except as follows: \_\_\_\_\_.

5. No rent has been prepaid for more than one (1) month and Tenant shall not prepay any such rent or other sum more than one (1) month in advance, except with Lender's prior written consent.

6. Tenant is not currently enjoying any free rent, partial rent, rebates, rental abatements, or rent concessions of any kind, except \_\_\_\_\_.

7. Landlord has not waived the performance or observance by Tenant of any of the terms, covenants, or conditions to be performed or observed by Tenant under the Lease.

8. Landlord is not in default under the Lease nor, to the best of Tenant's knowledge, has Landlord failed to duly and fully perform or observe any term, covenant, or condition by it to be performed or observed under the Lease which would, but for the existence of any applicable notice and/or grace period, constitute a default under the Lease, including, specifically, the exclusive use provision, if any, as set forth in the Lease.

9. Tenant has no defenses, set-offs, or counterclaims to the payment of rent and all other amounts due from Tenant to Landlord under the Lease, and Tenant has no claims or defenses to enforcement of the Lease.

10. Tenant has not been granted and has not exercised any options or rights of expansion, purchase, or first refusal concerning the Lease or the Premises, except \_\_\_\_\_.

11. The person signing this letter on behalf of Tenant is a duly authorized agent of the Tenant.

TENANT:

By: \_\_\_\_\_

Its: \_\_\_\_\_

(02261402)